

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK
AUG 23 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CYNTHIA B.,)	2 CA-JV 2012-0021
)	DEPARTMENT B
Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
ARIZONA DEPARTMENT OF ECONOMIC)	Appellate Procedure
SECURITY, TIMOTHY B., GABRIEL B.,)	
CHRISTIAN B., and AUDRIANA B.,)	
)	
Appellees.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J19550500

Honorable Gus Aragón, Judge

AFFIRMED

Child and Family Law Clinic
By Paul D. Bennett, a clinical professor appearing
under Rule 38(d), Ariz. R. Sup. Ct.

Tucson
Attorneys for Appellant

Thomas C. Horne, Arizona Attorney General
By Dawn R. Williams

Tucson
Attorneys for Appellee Arizona
Department of Economic Security

ESPINOSA, Judge.

¶1 Cynthia B. appeals from the juvenile court’s order severing her parental rights to her children Timothy, Gabriel, Christian, and Audriana, born May 1998, January 2001, September 2009, and August 2010 respectively. She contends the court terminated her rights “based on factors not alleged in the petition nor identified as circumstances that caused . . . removal” and on factors for which the state had not provided reunification services. Finding no error, we affirm.

¶2 We view the facts in the light most favorable to sustaining the court’s order. *See Lashonda M. v. Ariz. Dep’t of Econ. Sec.*, 210 Ariz. 77, ¶ 13, 107 P.3d 923, 928 (App. 2005). Cynthia gave birth to Audriana prematurely in August 2010, and, at the time of her birth, Audriana tested positive for amphetamines, methamphetamine, and opiates. Cynthia reported she had not known she was pregnant until two months before the birth and had used prescription pain medication during the pregnancy. Shortly after Audriana’s birth, the other three children were taken into custody, and Audriana was taken into custody a few weeks later.

¶3 The children were adjudicated dependent after Cynthia admitted the allegations made in amended dependency petitions, including allegations she was dependent on prescribed medications, had only had one prenatal appointment during her pregnancy with Audriana, had been involved in an earlier investigation by Child Protective Services (CPS) “due to allegations of drug use, domestic violence and neglect of the children” and did not participate in services and drug testing during that investigation, had failed to provide “proper adult supervision” for the children while she

and her husband were under the influence of drugs,¹ and had not provided a safe home for the children as the home “contain[ed] hazards which place the children at risk,” including “bullets on the floor.”

¶4 Cynthia subsequently was arrested after she took a friend’s tools to a pawnshop and was unable to repay the money to get them back. She was convicted in September 2011 of one count of theft by control and/or by controlling stolen property and was placed on a three-year term of probation. In November 2011 the juvenile court changed the case plan from reunification to severance and adoption, and the state filed a motion to terminate Cynthia’s parental rights.

¶5 The state sought to terminate Cynthia’s parental rights pursuant to A.R.S. § 8-533(B)(3), (B)(8)(a), and (B)(8)(c) on the grounds of chronic substance abuse and length of time in court-ordered out-of-home care. After a contested termination hearing, the juvenile court terminated Cynthia’s parental rights. The court found Cynthia had been “minimally compliant” with her case plan, which included case management, visitation, random drug urinalysis, substance-abuse monitoring, and counseling. It concluded the Arizona Department of Economic Services (ADES) had “made reasonable efforts to reunify” Cynthia with her children and the state had established the children had been in court-ordered out-of-home care for nine months and fifteen months, Cynthia had “substantially neglected and willfully refused to remedy the circumstances that cause

¹The children’s father’s rights also were severed after he entered an admission to the fifteen-months-in-care ground. He is not a party to this appeal.

[them] to be in an out-of-home placement,” and there was “a substantial likelihood that [she] will not be able to exercise proper and effective parental care and control in the future.” *See* § 8-533(B)(8)(a), (c). It also concluded it was in the children’s best interest to terminate Cynthia’s parental rights.² It determined, however, that the state had not proven the alleged ground of chronic substance abuse pursuant to § 8-533(B)(3).

¶6 On appeal, Cynthia maintains that because the juvenile court concluded the state had not proven the substance-abuse ground for severance, “a finding of termination based on time in care cannot be sustained.” She contends she lacked notice that her parental rights could be terminated if she failed to secure stable housing or a job and that ADES failed to provide sufficient services to address the problems the court ultimately relied on in severing her parental rights. We will not disturb the court’s severance order unless the factual findings upon which it is based “are clearly erroneous, that is, unless there is no reasonable evidence to support them.” *Audra T. v. Ariz. Dep’t of Econ. Sec.*, 194 Ariz. 376, ¶ 2, 982 P.2d 1290, 1291 (App. 1998).

¶7 Cynthia’s claim that she did not receive notice that her parental rights could be severed if she failed to secure safe and stable housing and employment and to otherwise remedy the children’s dependency is without merit. In support of her claim Cynthia cites *Marina P. v. Arizona Department of Economic Security*, 214 Ariz. 326, 152 P.3d 1209 (App. 2007). In that case, ADES had not alleged the ground of chronic abuse

²Cynthia does not challenge the juvenile court’s best-interests finding on appeal. Indeed she conceded at the severance hearing that it would be in the children’s best interests “to permanently reside with their grandfather.”

of drugs in its motion to terminate Marina’s parental rights or otherwise informed Marina that her rights could be severed on the basis of drug abuse, and this court therefore determined her rights could not be terminated on that ground. *Id.* ¶¶ 35, 44. But in this case, Cynthia’s case plan, which she reviewed and signed, includes requirements that she obtain safe and stable housing and employment. Indeed, Cynthia acknowledged at the severance hearing that she had been required to provide a stable home and income as well as to maintain regular contact with her case manager and to visit the children. And, at dependency review hearings, the juvenile court admonished Cynthia that if she failed to “participate in case plan tasks” the case plan could change from reunification to severance and adoption or that her parental rights could be severed. Thus, unlike the situation in *Marina P.*, Cynthia received adequate notice of the possible grounds for severance.

¶8 We also reject Cynthia’s claim that the juvenile court abused its discretion in concluding ADES had “made a diligent effort to provide appropriate reunification services” as required by § 8-533(B)(8). ADES is required to make reasonable efforts to reunify a family, *Mary Ellen C. v. Ariz. Dep’t of Econ. Sec.*, 193 Ariz. 185, ¶ 33, 971 P.2d 1046, 1053 (App. 1999), but is not required to “provide ‘every conceivable service’” or to “undertake rehabilitative measures that are futile,” *id.* ¶¶ 34, 37, quoting *In re Maricopa Cnty. Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994). In this case, because of Cynthia’s admitted prescription drug use, ADES’s reunification efforts focused on her sobriety and parenting skills. Although ADES did not provide specific housing or employment services, we cannot say that services aimed at helping

Cynthia establish and maintain sobriety were not “appropriate reunification services” that could assist her in obtaining stable housing and employment. And Cynthia cites no authority to suggest that ADES is not entitled to prioritize certain tasks within a case plan—in this case the substance-abuse-related tasks that Cynthia largely failed to complete by the time of the severance hearing. *See* Ariz. R. Civ. App. P. 13(a)(6); Ariz. R. P. Juv. Ct. 106(A).

¶9 Cynthia places a great deal of emphasis on the juvenile court’s conclusion that ADES had not proven chronic substance abuse as a ground for severance. But she cites no authority to support the inference she draws from that conclusion—that the court could therefore not consider her drug use or related failures to comply with her case plan at all in determining whether ADES had provided appropriate services or whether she had substantially neglected and willfully refused, or been unable, to remedy the circumstances that caused her children to be in out-of-home placements. The court concluded ADES’s efforts had been diligent and appropriate. In view of Cynthia’s failure to meaningfully comply with drug testing and treatment and her own admissions at the severance hearing that she had been dependent on prescription opiates that “clouded [her] judgment,” we cannot say the court’s conclusion was unsupported by reasonable evidence or otherwise an abuse of discretion.³ *Cf. Mary Lou C. v. Ariz. Dep’t of Econ. Sec.*, 207 Ariz. 43, ¶ 18,

³Relying on an ADES policy manual but no legal authority, Cynthia also argues ADES failed to provide adequate services because her case manager did not contact her during or after her time in jail. But, contrary to her assertion, the case manager testified she had contacted Cynthia’s probation officer. She further testified she had not known where to contact Cynthia and Cynthia had not contacted her, although staying in contact

83 P.3d 43, 50 (App. 2004) (efforts presumed futile when evidence showed mother could not have completed services by time of severance hearing due to substance abuse problem and incarceration).

¶10 To the extent Cynthia’s arguments could be read as a challenge to the sufficiency of the evidence to support the grounds for termination, it also fails. Section 8-533 focuses on the circumstances that cause the children to be in out-of-home care—the circumstances existing at the time of severance. *In re Maricopa Cnty. Juv. Action No. JS-8441*, 175 Ariz. 463, 467, 857 P.2d 1317, 1321 (App. 1993), *abrogated on other grounds by Kent K. v. Bobby M.*, 210 Ariz. 279, 110 P.3d 1013 (2005). As in *JS-8441*, the cause of the children’s placement here is their dependency—their lack of “proper and effective parental care and control.” A.R.S. § 8-201(13)(a)(i). Even accepting that Cynthia either had not been or is not now abusing prescription drugs, the facts remain, as the juvenile court found, that she has not been able to provide appropriate parental care and control. She was arrested and placed in jail during the dependency, she has little relationship with the younger children, she has no home or job, and at the time of the severance hearing she had not contacted the children for approximately two months and, due to her jail term and the children’s placement in Phoenix, had not visited them in the preceding year. And, she admitted at the severance hearing that she would not be able to provide housing or a

with the case manager was a requirement of her case plan. In any event, even if ADES were required to contact Cynthia in jail and Cynthia had not contributed to that failure by not contacting her case manager, she has not shown how the juvenile court abused its discretion in finding that ADES had otherwise provided adequate services given that she spent, at most, forty-five days of the seventeen-month dependency in jail.

source of income for at least another six months. This evidence amply supports the court's conclusion that the state had established the time-in-care grounds for severance by clear and convincing evidence.

¶11 For all these reasons, the judgment of the juvenile court is affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge